

FILED

2013 JUN 28 AM 10:19

CLERK OF DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY WNA DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RUFUS GRAY,

Petitioner,

vs.

M. CATE, et al.,

Respondents.

CASE No. 09-CV-00709 BEN (KSC)
**ORDER DENYING CERTIFICATE
OF APPEALABILITY**

[ECF No. 70]

Presently before the Court is Petitioner Rufus Gray's request for a Certificate of Appealability ("COA"). ECF No. 70. On November 3, 2011, United States District Judge (then United States Magistrate Judge) Cathy Ann Bencivengo issued a thoughtful and well-reasoned Report and Recommendation recommending denial of Petitioner's Second Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. ECF. No. 47. On several occasions, the Court granted Gray additional time to file objections. Ultimately, however, Gray failed to timely object to Judge Bencivengo's findings and on September 21, 2012, the Court adopted the Report and denied the Petition. On October 26, 2012, Gray filed a notice of appeal and a request for a COA. ECF Nos. 69 & 70. The matter is pending in the Ninth Circuit.

The Court may issue a COA "only if the applicant has made a substantial

1 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “A
2 petitioner satisfies this standard by showing that jurists of reason could disagree
3 with the district court’s resolution of his constitutional claims or that jurists could
4 conclude the issues presented are adequate to deserve encouragement to proceed
5 further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*,
6 529 U.S. 473, 484 (2000)). Gray does not have to show “that he should prevail on
7 the merits. He has already failed in that endeavor.” *Lambright v. Stewart*, 220
8 F.3d 1022, 1025 (9th Cir. 2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4
9 (1983)).

10 Having reviewed the Second Amended Petition, the Court concludes that the
11 issues are not debatable among jurists of reason and they do not deserve
12 encouragement to proceed further. Accordingly, the Court declines to issue a COA.
13 Gray’s request is denied.

14 **IT IS SO ORDERED.**

15
16 DATED: June 27, 2013


HON. ROGER T. BENITEZ
United States District Court Judge